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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 364.

MRS. MARY VIRGINIA BELL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN WARE BELL, DECEASED,
Petitioner,

v.

TUG SHRIKE, IN REM, SOUTHERN TRANSPORTATION COMPANY INCORPORATED, A CORPORATION AND SOUTHERN TUG CORPORATION, IN PERSONAM,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Virginia, Norfolk Division, written by Chief Judge Walter E. Hoffman, is reported at 215 F. Supp. 377 (Appendix B of Petition) and the unanimous Opinion of the Court of Appeals for the Fourth Circuit written by Chief Judge Simon E. Sobeloff, affirm-

ing the District Court, is reported at 332 F (2d), 330 (Appendix A of Petition).

JURISDICTION

The jurisdiction of the Court is invoked under *Title 28, United States Code Annotated, Section 1254(1)*, which applies to any civil or criminal case. The question is immediately raised as to whether this section encompasses an admiralty case such as the instant case.

QUESTIONS PRESENTED

The question here presented is twofold in nature and may be stated as follows:

(1) Should the marital status of the petitioner and decedent be determined under the law of the State of Virginia where they were domiciled, where they celebrated their illegal marriage ceremony, where they lived together in adultery for a number of years, and the only state which had any nexus with them; or

(2) Should their marital status be determined under the law of some other state with which they had no nexus but whose law may be more favorable to the petitioner.

STATUTES INVOLVED

The statute here involved is *Title 46, United States Code Annotated, Section 688*, commonly known as the *Jones Act*. However, said statute incorporates therein *Title 45, United States Code Annotated, Section 51, et seq.*, commonly

known as the *Federal Employers' Liability Act*. The beneficiaries under both statutes are the same since the beneficiaries under the *Jones Act* are determined by reference to the *Federal Employers' Liability Act*.

STATEMENT OF THE CASE

Petitioner's statement of the case omits several pertinent facts which should be brought to the attention of this Court.

The decedent, John Ware Bell, married his first wife, Helen Woolard (Bell), on March 16, 1940. After having three (3) children by her, he deserted said wife and children. She secured a divorce from him on June 12, 1951. He then married his second wife, Catherine Estal Smith (Bell), on June 19, 1951. They had no children. He likewise deserted her. While still legally married to Catherine Estal Smith Bell, he *illegally* married Mary Virginia White (Bell) at Mathews, Virginia on December 13, 1956. The marriage certificate issued by the Clerk of the Circuit Court, of Mathews County, Virginia, indicates that the decedent falsely informed the Clerk that he was single and had never been previously married. The petitioner was obviously present when said marriage certificate was issued. The following year, on September 18, 1957, decedent was divorced by his second wife, Catherine Estal Smith Bell, in the Circuit Court of the City of Portsmouth, Virginia. Decedent was then free to go through another marriage ceremony with Mary Virginia White (Bell) and thereby legalize their bonds of matrimony but this they failed to do. As far as the record indicates, decedent and Mary Virginia White (Bell) lived together in adultery at Norfolk, Virginia from December 13, 1956, until decedent's death on September 12, 1959. The overwhelming weight of the

evidence establishes that Mary Virginia White (Bell) was not the putative wife of the decedent. She knew, prior to her *illegal* marriage ceremony on December 13, 1956, that the decedent was then still married to his second wife, Catherine Estal Smith Bell. That she did not see fit to enter into another marriage contract with the decedent subsequent to September 18, 1957, when the legal impediment had been removed, is to be regretted but it is well settled that the divorce decree does not relate back so as to validate an attempted marriage by one of the parties prior to the rendition of the decree. 55 C. J. S., "*Marriage*," sec. 68; *Tetterton* v. *Arctic Tankers, Inc.*, 116 F. Supp. 429.

The foregoing facts were, for the most part, recited from the Memorandum Opinion of District Judge Hoffman, found on pages 31 and 32 of Appendix B of the Petition.

Thus the testimony accepted by the District Court and later by the Circuit Court of Appeals was that the parties were at all times domiciled in the State of Virginia that they celebrated their illegal marriage ceremony in the State of Virginia, that they lived in adultery for a number of years in the State of Virginia, that the decedent died in the State of Virginia, and that they never cohabited, as purported husband and wife, in any other state. Under such circumstances the District Court and the Circuit Court of Appeals felt compelled to apply the law of the State of Virginia in determining the marital status of the parties. Since the State of Virginia does not recognize common law marriages, both the District Court and the Circuit Court of Appeals ruled that the petitioner was not the wife, and consequently is not the *surviving widow*, of the decedent. In

spite of said rulings the petitioner continues to refer to herself as the Widow Bell which is nothing more than an attempt to create sympathy for her claim.

REASONS FOR REJECTING THE WRIT

(a) *Legislative Intent*

The problem of what law governs the petitioner's marital status lies at the threshold of this case. Congress might have chosen to spell out the answer to the problem in the *Federal Employers' Liability Act*, and had it done so, the problem could be determined from the statute itself. But it did not choose to do so, and therefore, the District Court and the Circuit Court of Appeals had to decide what law should be applied.

One solution is to view the question as one of federal law since a purely federal right is involved. This, the petitioner urges. But it would not be appropriate here. While a federal right is involved, the statute deals with a familial relation. There is no federal law of domestic relations, which is primarily the concern of the locality. In *De Sylva v. Ballentine*, (S.Ct., 1956) 351 U.S. 570, 76 S.Ct. 974, Mr. Justice Burton, speaking for this Court, in a case involving the *Federal Copyright Act* stated in *76 S.Ct. at page 980*:

> "We come, then, to the question of whether an illegitimate child is included within the term 'children' as used in § 24. The scope of a federal right is, of course, a federal question, *but that does not mean that its content is not to be determined by state, rather than federal law*. Cf. Reconstruction Finance Corp. v. Beaver County, 328 U.S. 204, 66 S.Ct. 992, 90 L.Ed.

1172; Board of County Commissioners v. United States, 308 U.S. 343, 351-352, 60 S.Ct. 285, 288-289, 84 L.Ed. 313. *This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.*"

De Sylva v. *Ballentine, supra*, eliminates federal law in favor of local law. It thus becomes necessary to determine what local law is to be applied. The respondents believe that the law of the State of Virginia should be applied because this is the only state that had any nexus with the parties.

The normal conflicts rule is that the marital status of the parties shall be determined by the law of the place where the marriage was contracted, or in the alternative, the law of the domicile of the contracting parties. In the instant case, these two places coincide in the State of Virginia. Therefore, the appropriate law, in the conflicts sense, would be the law of the State of Virginia. The District Court and the Circuit Court of Appeals applied the law of the State of Virginia.

The petitioner recognizes that the law of the State of Virginia would ordinarily be applied in determining her marital status. However, she urges that the appropriate law of domestic relations should be applied only when and to the extent that such law harmonizes with what she believes to be the legislative intent of the *Federal Employers' Liability Act*, namely, a uniform application of the term *surviving widow* throughout the fifty states. The petitioner seeks to establish what she believes to be said legislative intent by citing from the Congressional Record,

April 2, 1906, at pages 4602 and 4604. This was an exercise in futility since the Congressional Record so cited is completely silent with respect thereto.

Directly to the point is the decision of this Court in *Seaboard Airline Railway Company* v. *Kenney*, (S.Ct., 1916) 240 U. S. 489, 36 S.Ct. 458. Therein this Court sought, found and determined said legislative intent. Mr. Chief Justice White, speaking for the entire Court, in *36 S.Ct., at page 460*, said:

> "Plainly the statute contains no definition of who are to constitute the next of kin to whom a right of recovery is granted. But as, speaking generally, under our dual system of government, who are next of kin is determined by the legislation of the various states to whose authority that subject is normally committed *it would seem to be clear that the absence of a definition in the Act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law.*"

Seaboard Airline Railway Company v. *Kenney*, *supra*, was recently reaffirmed by this Court in *Poff* v. *Pennsylvania Railroad Company*, (S.Ct., 1946) 327 U.S. 309, 66 S.Ct. 603, wherein the question of beneficiaries under the *Federal Employers' Liability Act* was also involved. Mr. Justice Douglas, speaking for this Court, in *66 S.Ct., at page 605*, said:

> "****It is clear that 'next of kin' is determined by state law, Seaboard Air Line Ry. v. Kenney, 240 U.S. 489, 36 S.Ct. 458, 60 L.Ed. 762. *State law governs whether it is necessary to determine if one relative is*

*closer than another, or if a claimant falls within or without the class. *****"

See also, *Hammond v. Pennsylvania Railroad Company*, (S.Ct. N.J., 1959) 31 N.J. 244, 156 A. (2d) 689, 1960 AMC 973, which likewise involved the determination of beneficiaries under the *Federal Employers' Liability Act*. Therein, at *page 974 (1960 AMC)*, Chief Judge Weintraub said:

> "Defendant urges that who are 'children' must be determined by state law. In Seaboard Airline Railway v. Kenney, 240 U.S. 489 (1916), the Court, faced with the question whether 'next of kin' in this statute (1) required the uniform application of its common-law meaning or (2) embraced current definitions of the term under the law of the state concerned, accepted the latter proposition. This view was reaffirmed in Poff v. Pennsylvania Railroad Company, 327 U.S. 300 (1946). *The holding would seem to apply with equal force to 'widow' and 'husband', since these terms, like 'next of kin', involve a status ascertainable only by reference to some rule of law.* ****"

The foregoing cases clearly indicate the intent of Congress to apply state law in the determination of familial relationships arising under the *Federal Employers' Liability Act*. The state law to be applied must be the law of the state which created such relationship. The law of the State of Virginia created the *alleged* relationship existing between the petitioner and the decedent. Therefore the law of the State of Virginia is decisive in the determination of that relationship. That law indicates that the petitioner and the

decedent were *illegally* married and for that reason she was not the wife of the decedent, nor is she his *surviving widow*.

The petitioner is unwilling to accept the doctrine enunciated in *Kenney, supra, Poff, supra,* and *De Sylva, supra,* because the net result thereof is not beneficial to her. She urges that this Court should apply the *common law*. She does not direct this Court's attention to any principle of conflicts which would justify this Court in ignoring the law of the State of Virginia in favor of the common law. She merely points to the law of those states, other than Virginia, which recognizes common law marriages, or in the alternative the American common law, or in the further alternative the English common law as it existed at the time of the separation from the mother country, and requests that such law be applied, *if favorable to her*.

Chief Judge Sobeloff, in the Opinion of the Circuit Court of Appeals, found on pages 20 and 21 of Appendix A of the Petition, aptly disposed of said contentions in the following language:

> "****It would at best be illogical to disregard the state law which under accepted principles of conflicts of law would apply, merely because the law of some other place, unrelated to the parties and to the subject matter, happens to afford one in the appellant's position more favorable treatment. If the Court, in the absence of an admiralty rule or policy, is to look to some source other than the law of Virginia, we think that it would have to be the American common law; but to say that would really not contribute to a practical solution here since the 'common law' has been variously interpreted by judicial decision.

> If we inquire into the law of marriage and divorce under the law of England as it existed at the time of the separation from the mother country,' Seaboard Air Line Ry. v. Kenney, 240 U.S. 489, 494 (1916), in an effort to discover a common law which might be applied, the result is no more favorable to appellant than the law of Virginia.****"

Petitioner's last mentioned contention was overruled by this Court in *Seaboard Airline Railway Co. v. Kenney, supra*, which as we have already pointed out was a *Federal Employers' Liability Act* case, wherein this Court, in *50 S.Ct., at page 460*, said:

> "****But, it is urged, as next of kin was a term well known at common law, it is to be presumed that the words were used as having their common-law significance, and therefore as excluding all persons not included in the term under the common law; meaning, of course, the law of England as it existed at the time of the separation from the mother country. Leaving aside the misapplication of the rule of construction relied upon, it is obvious that the contention amounts to saying that Congress, by the mere statement of a class, that is, next of kin, without defining whom the class embraces, must be assumed to have overthrown the local law of the states, and substituted another law for it; when conceding that there was power in Congress to do so, it is clear that no such extreme result could possibly be attributed to the act of Congress without express and unambiguous provisions rendering such conclusion necessary. The truth of this view will be made at once additionally ap-

parent by considering the far-reaching consequence of the proposition, since, if it be well founded, it would apply equally to the other requirements of the statute, — to the provisions as to the surviving widow, the husband and children, and to parents, thus, for the purposes of the enforcement of the act, overthrowing the legislation of the states on subjects of the most intimate domestic character, and substituting for it the common law as stereotyped at the time of the separation. The argument that such result must have been intended, since it is to be assumed that Congress contemplated uniformity, that is, that the next of kin entitled to take under the statute should be uniformly applied in all the states, after all comes to saying that it must be assumed that Congress intended to create a uniformity on one subject by producing discord and want of uniformity as to many others.

But we need go no further, since the want of merit in the contention is fully demonstrated by authority. ****"

Chief Judge Sobeloff, in the Opinion of the Circuit Court of Appeals, found on page 22 of Appendix A of the Petition, had this to say with reference to petitioner's contention that uniformity will be achieved by an application of the common law:

"*****Further, if admiralty does indeed favor uniformity, this end is no better achieved in cases like ours by looking to a federal judge's interpretation of the common law than by relying upon the domestic relations laws of the states in which the parties are domiciled."

(b) *Other Beneficiaries May Be Effected*

The petitioner urged before the District Court, and also before the Circuit Court of Appeals, that she be accorded the status of a *surviving widow* since she is the only claimant of the settlement fund.

This Court must of necessity decide this case in the light of its effect on future cases. It should be remembered that the death provisions of the *Federal Employers' Liability Act* establish three mutually exclusive classes of beneficiaries: recovery in the first instance is for the benefit of the surviving spouse and children; only if there are none may there be recovery for the benefit of surviving parents; only if there are neither spouse and children nor parents, may there be recovery for dependent next of kin. Thus, the presence of a surviving widow, whether she be statutory or common law, precludes recovery by a mother and father or dependent next of kin. If this Court accords the petitioner, who is nothing more than the survivor of a bigamous marriage, the status of a surviving widow then it would, at the same time, be according like status to all such persons in future cases to the possible detriment of parents and next of kin therein.

Chief Judge Sobeloff, in the Opinion of the Circuit Court of Appeals, found on page 28 of Appendix A of the Petition, recognized this problem and disposed of same in the following language:

> "While it is true that in the present instance no other woman is competing with the appellant for a share in the settlement fund, a decision according the appellant standing could operate to the detriment of

claimants such as parents or next of kin in future cases."

District Judge Hoffman, in his Memorandum Opinion, found on page 35 of Appendix B of the Petition, disposed thereof as follows:

> "The argument that a common law wife, not recognized by the laws of Virginia as a 'wife', may bring herself within the meaning of a 'widow' under the Jones Act merely because there is no rival claimant asserting her right of recovery as a widow, is unfenable. If the libelant was not within the class of persons whom Congress intended should be entitled to a recovery for the negligently caused death of a seaman, the fact that she is the only one claiming to be a member of that class does not bring her within it. To so hold would permit any woman, having had illicit relations with a seaman, to maintain an action under the Jones Act under the theory that she is the only person claiming to be a 'widow.' We do not suggest that this example is applicable to the present set of facts, but where do we draw the line? If the federal courts do not apply the existing state law of domestic relations, we will have created a federal common law of domestic relations wherever a federally-created right is involved."

Therefore, this Court should decline to accept petitioner's contention that a woman, who goes through a marriage ceremony with a man knowing that he has an undivorced wife in being, should be accorded the status of a surviving

widow merely because she is the only claimant to the settlement fund.

(c) *Putative Widow*

The petitioner urged before the District Court, and also before the Circuit Court of Appeals, that she be accorded the status of a *putative widow*. However, the evidence adduced before the District Court on December 21, 1961, and subsequent dates, failed to sustain her position.

A *putative widow* is one who contracts a marriage in good faith and in ignorance that an impediment exists that renders it unlawful. Therefore, the petitioner occupies the status of a *putative widow* only if she contracted her marriage with the decedent in good faith and in ignorance that he was still married to his second wife.

District Judge Hoffman, after hearing the evidence, decided that the overwhelming weight of said evidence established that the petitioner was not the putative wife of the decedent. District Judge Hoffman's Memorandum Opinion with respect thereto, found on page 32 of Appendix B of the Petition, reads as follows:

> "The overwhelming weight of the evidence establishes that Mary Virginia White (Bell) was not the putative wife of the decedent; she knew, prior to her illegal marriage ceremony on December 13, 1956, that decedent was then still married to Catherine Estal Smith Bell. ***"

Thus, District Judge Hoffman found that the petitioner

was not the putative wife of the decedent and based his finding with respect thereto upon the following testimony:

JOSE FRANQUEZ KAMMINGA, SWORN

* * *

(Tr. 109, 110)

"Q. All right. Now, during your conversation with Mrs. White and Mr. Bell—was that in 1956?

A. Yes, sir, in 1956.

Q. And was it prior to December of 1956?

A. No, sir. This is around about February or March.

Q. Of '56?

A. Of '56.

Q. So it was prior to December, '56? It was before December, '56?

A. Before December, yes sir.

Q. Now, at the time that you had your conversation with Mrs. White and Mr. Bell about you moving out, was any mention made about his divorce at that time? And if so, tell us about that."

* * *

(Tr. 111-112)

"Q. Tell us the entire conversation.

A. Well, when she mentioned to me that she was getting a divorce from her husband and that Johnny was getting a divorce from his wife, I told her—I said, 'Well, I imagine you and him are going to get married.' She said, 'Well, I hope so, because he's very

good to me,' and I always appreciate people when they say they're good because he is good, and I just say, 'Well, good luck,' and that's all.

Q. This was all in 1956?

A. Yes, sir.

Q. And when Mrs. White said that Johnny was getting a divorce from his wife, to what wife was he referring—I mean was she referring do you know that?

A. She was referring to Catherine."

* * *

CATHERINE ESTAL REYNOLDS, SWORN

* * *

(Tr. 60, 61)

"Q. Now, you have mentioned calling him at one time at the Duncan Avenue address. Did you ever call him at any other address?

A. Yes. They were living out on—it's something like Moran, but it's not Moran. He was there and I called—

Q. Was it Marne, M-A-R-N-E?

A. That was it. Like I say, it was something like Moran. I called and a woman answered, and I asked her who was speaking and she said it was Mrs. White, and I asked her then was Johnny home, and she said, 'No,' and I told him—I told her who I was and what I wanted, and she said, 'Well he's not home now and dial—' —I don't remember whether she told me when

he'd be home or not, but I called back again, and he was home and I asked him then, would he give me a divorce.

Q. Before we get to that, let me ask you this: When you called and talked to the lady who identified herself as Mrs. White, you said you told her what you wanted. What did you tell her?

A. I told her I wanted to talk to my husband about the divorce, about giving me a divorce. She said, 'Well, aren't you divorced?' I said, 'No, he won't give me one.'

Q. All right. Can you tell us when that was?

A. It was sometime the last part of October or the first part of November.

Q. '56?

A. '56.

THE COURT: What year?

Q. (By Mr. Sykes) And you finally secured your divorce in September, '57?

A. Yes, sir.

* * *

The foregoing testimony of *Jose Franquez Kammingo* and *Catherine Estal Reynolds* clearly indicates that the petitioner knew or should have known that the decedent was still married to his second wife when the petitioner married him on December 13, 1956.

However, even if this Court were to determine that the petitioner is a *putative widow*, which it should not do, then this Court must go one step further and determine that as

such, she is within the term *surviving widow* used in the *Federal Employers' Liability Act*.

That the petitioner must have been lawfully married to the decedent under appropriate state law in order to qualify as a *surviving widow* is amply supported by text authorities and reported cases.

Thus, in the text book *Maritime Injury and Death by Paul S. Edelman (1960)*, the author makes the following statement at page 134:

> "A 'widow' under the Jones Act must be lawfully married under state law. A woman believing herself lawfully married may have some rights under state law, but will not be considered a widow under the Jones Act."[18]
>
> [18] "*Beebe* v. *Moormack Gulf Lines, Inc.* (C.C.A. 5th 1932) 59 F. 2d 319 ('putative' wife under Louisiana law, innocently believing herself to be lawfully married to one already married, held not to be a widow under the Jones Act)."

The Court's attention is directed to the case of *Beebe v. Moormack Gulf Lines, Inc.* (C.C.A. 5, 1932) 59 F. 2d 319, cert. denied, 287 U.S. 597, 53 S.Ct 22, 77 L.Ed. 520, which is cited in the above text. Therein Knighton was employed as an oiler in the engine room of a ship, and was killed on navigable waters through the negligence of the ship's owners. He was survived by a wife, child and mother who lived in Arkansas, and also by Marian Beebe, with whom he had gone through a marriage ceremony in Louisiana some weeks before his death, and with whom he had since lived in New Orleans, supporting her as his wife,

she not knowing until after his death of his prior marriage. The ship's owners settled with Knighton's administrator with respect to the claims of his wife, child and mother. The claim of Marian Beebe was not recognized, and a libel in personam under the *Jones Act* was brought for her benefit setting up all these facts. The libel was dismissed for want of a cause of action and an appeal was taken. The Appellate Court affirmed the judgment of the District Court. Circuit Judge Sibley, speaking for the Court, at page 320, said:

> "The rights of the putative wife are exceptional, and she has none beyond those specially granted. While the law, on account of her good faith, shields the putative wife from shame and protects her in her rights of property, she is not included in the terms 'widow' and 'wife', which necessarily imply a lawful marriage. ***This court held in United States v. Robinson, 40 F. (2d) 14, that a putative wife under the law of Louisiana is not a 'spouse' under the act of Congress relating to war risk insurance (Section 22, as added by Act Oct. 6, 1917, Sec. 2 (40 Stat. 400), and amended by Act Dec. 24, 1919, Sections 2-4 (41 Stat. 371), and Section 402, as added by Act Oct. 6, 1917, Sec. 2 (40 Stat. 409)). The reasoning in that case holds good in this. Judgment affirmed."

The leading case on the question here under discussion is *Lawson* v. *United States*, (C.C.A. 2, 1951) 192 F. 2d 479, cert. denied, 343 U.S. 904, 72 S. C. 635, 96 L.Ed. 1323. Therein, the litigation resulted from a collision on the high seas between two vessels owned by the United States. The collision caused the death of two seamen whose administrators brought suits under the applicable federal

statute, *Title 46, United States Code Annotated, Section 761, et seq.* The final decree entered in the litigation awarded Lawson, Administrator of seaman Cardenas, $2,000.00 for the benefit of Paula Liendo and $13,250.00 for the benefit of Antonia Martinez. The United States appealed from that part of the final decree which made an award for the benefit of Antonia Martinez who was a *putative wife*. The appeal was heard by Chief Judge Thomas W. Swan, Circuit Judge Jerome N. Frank and Circuit Judge Charles E. Clark. Chief Judge Swan wrote the opinion for the Court and, at page 480, 481 thereof, said:

> "In holding that Antonia, who innocently went through a marriage ceremony with Cardenas when he had a legal wife living and undivorced, was also a 'wife' within the meaning of the statute, the district court relied upon this court's decision in Middleton v. Luckenbach S. S. Co. It was there held that an illegitimate child could be considered a 'child' and his mother a 'parent' within the meaning of this statute. We think the implication of that case is adverse rather than favorable to Antonia's claim to be a 'wife'. In common parlance an illegitimate son or daughter is called the 'child' of its mother and the mother the child's 'parent'. But the common meaning of 'wife' is legal wife; *and a bigamous marriage does not make the defrauded and innocent woman a 'wife' in common parlance.* The problem, of course, is to determine what meaning the legislators intended (or may be assumed to have intended) to ascribe to the word 'wife'. And we see nothing to suggest that they used the word in other than its normal meaning, or intended that a man could have two or more wives all recovering at once

under this statute. While the question under the Death on the High Seas Act appears to be one of first impression, analogous decisions under similar state and federal statutes support the view above expressed."[5]

[5] "The words 'wife' or 'widow' in federal statutes are almost universally interpreted to include only the legal wife. Decisions under National Service Life Insurance so holding are: Castor v. United States, 8 Cir., 174 F. 2d 481; Schurink v. United States, 5 Cir., 177 F. 2d 809; Gehm v. United States, D.C.N.Y., 83 F. Supp. 1003; Cavanaugh v. United States, D.C.Mo., 94 F. Supp. 776; under War Risk Insurance: United States v. Robinson, 5 Cir., 40 F. 2d 14 (interpreting the word 'spouse'); cf. Schiefer v. United States, D.C.N.Y., 52 F. 2d 527 (where there is strong dicta that the putative wife was the legal wife—the case, however, contained an element of estoppel against the legal wife); under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. Sec. 901 et seq.: Bolin v. Marshall, 9 Cir., 76 F. 2d 668, certiorari denied, 296 U.S. 573, 56 S.Ct. 116, 80 L.Ed. 404; Green v. Crowell, 5 Cir., 69 F. 2d 762, certiorari denied, 293 U.S. 554, 55 S.Ct. 88, 79 L.Ed. 656; *under the Jones Act*, 46 U.S.C.A. Sec. 688, and the *Federal Employers' Liability Act*, 45 U.S.C.A. Sec. 51 et seq; *Beebe v. Moormack Gulf Lines, Inc.*, 5 Cir., 59 F. 2d 319, certiorari denied, 287 U.S. 597, 53 S.Ct. 22, 77 L.Ed. 520 (*this despite the fact that under Louisiana Law the putative wife had certain rights against the man's estate*); Meisenhelder v. Chicago & N.W. Ry. Co., 170 Minn. 317, 213 N.W. 32, 51 A.L.R. 1408; In re Tufts' Estate, 228 Wis. 221, 280 N.W. 309; Howes v. Pere Marquette R. Co., 28 Ohio App. 297, 162 N.E. 675."

The foregoing authorities clearly indicate that the term *surviving widow* necessarily implies a lawful marriage. Therefore, even if the petitioner is considered a *putative wife*, she is not entitled to recover under the *Jones Act*.

(d) *Common Law*

The petitioner argues, on page 10 of her Petition, as a proposition of law, that upon removal of the existing impediment, by Catherine's divorce in 1957, the petitioner and the decedent, by their continued cohabitation, entered into a valid common law marriage as a result of which she should be considered the *surviving widow* of said decedent.

There is one important exception to the proposition of law stated by the petitioner which the petitioner has failed to call to the attention of this Court. In Volume 35, *American Jurisprudence*, pages 312, 313, under the subject *Marriage* the following exception to said proposition of law is noted:

> "§ 201—After Removal of Impediment To Marriage— * * * * Of course, *in those jurisdictions wherein common-law marriages are not valid, no presumption or inference of marriage can arise from habit and repute after the removal of an impediment.*"

The above-mentioned exception was applied in the case of *Tetterton v. Arctic Tankers' Inc., et al.*; (D.C. E.D. Pa., 1953) 116 Fed. Supp. 429. Therein Maria Tetterton, Administratrix of the Estate of Fenner Tetterton, who was also his alleged widow, brought suit under the "Death on the High Seas Act" to recover damages for the death of her decedent. Maria first met Tetterton in the

early part part of 1943. At that time she had a husband, a man named Bochiccio, whom she had married a few months before she met Tetterton, but who had been sent to jail for some offense which he had committed shortly after her marriage to him. In June of 1943 Tetterton telephoned Maria from Florida and told her "You don't really have to be married down here to live as husband and wife". As a result of this conversation Maria went to Florida and entered into some kind of compact with Tetterton. She lived with Tetterton, as husband and wife, in Florida and then moved with him to New York where they continued to live as husband and wife until the date of his death. While living in New York as husband and wife she obtained an annulment of her marriage to Bochiccio. The District Court had to decide whether Maria should be considered as the *surviving widow* of the decedent under the provisions of the "Death on the High Seas Act". Chief Judge Kirkpatrick heard the case and decided that *she was not the surviving widow of the decedent* under the provisions of said act and consequently allowed her no recovery. At page 432, Chief Judge Kirkpatrick said:

> "The difficulty with the libellant's position in this respect is that when the impediment was removed she was, and has been ever since, domiciled in New York and New York does not recognize the validity of a common-law marriage entered into in that State since 1933. There is no proof that Maria and Tetterton were domiciled at any time in any state which permits common-law marriages. *Virginia, where she and Tetterton visited his relatives, does not.*"

The language in *Tetterton v. Artic Tankers, supra*, above quoted, applies equally as well to our instant case.

> "The difficulty with Widow Bell's position in this respect is that when the impediment was removed, she was, and has been ever since, domiciled in Virginia and Virginia does not recognize the validity of a common-law marriage entered into in that State. There is no proof that Widow Bell and John Ware Bell were domiciled at any time in any state which permits common-law marriages."

The fact that the State of Virginia does not recognize common law marriages is well settled and not open to dispute. Thus in *National Union Fire Insurance Co. v. Britton* (D.C.D.C., 1960) 187 Fed. Supp. 359, District Judge Holtzoff, at page 364, said:

> "This precise situation was presented in Travers v. Reinhardt, 205 U.S. 423, 430-440, 27 S.Ct. 563, 51 L.Ed. 865. In that case the couple proposed to enter into a common-law marriage in Virginia. *As the State of Virginia did not recognize such marriages, this contractual relation was not valid.*"

See also *Offield v. Davis* (S. Ct. Va., 1902) 100 Va. 250, 263, 40 S.E. 910 wherein the Court at page 263 said:

> "We are therefore of opinion that the enactment of that statute wholly abrogated the common law in force in this State on the subject of marriages, and that no marriage or attempted marriage, if it took place in this State can be held valid here, unless it has been shown to have been under a license, and solemnized according to our statutes".

District Judge Hoffman, in his Memorandum Opinion, found on page 33 of Appendix B of the Petition, had this to say with reference to the above-mentioned proposition of law advanced by the petitioner:

> "It is conceded that Virginia does not recognize common law marriages. The argument is one of interest for students of law but to accept this doctrine would require a reversal of many cases already decided to the contrary by the United States Supreme Court."

(e) *Errata*

The petitioner has been guilty of numerous errors in her Petition, a few of which, we believe, should be called to the attention of the Court. The page references are to pages of the Petition.

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The petitioner states that the decision of the Circuit Court of Appeals conflicts in principle with the purpose and intent of the *Loans Act* and with the *decisions* of this Court. However, she fails to cite any case from this Court which indicates such conflict. The respondents, on the other hand, have cited *Kenney, supra, Poff, supra,* and *De Sylva, supra,* which indicate that no such conflict exists.

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The petitioner states that the case of *Travers* v. *Reinhardt*, 205 U.S. 423, 27 S.Ct. 563, 51 L.Ed. 865, recog

nizes common law marriage. What the petitioner fails to state is that the Court therein held that cohabitation of the parties in the State of Virginia failed to establish a common law marriage, that cohabitation of the parties in the State of Maryland failed to establish a common law marriage and that only their cohabitation in the State of New Jersey, which then recognized common law marriage, justified their recognition as husband and wife.

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The petitioner states that according to the common law of England, existing in the Colonies at the time of the American Revolution, consenstial marriages were valid. The thrust of this statement is that the common law of England, existing in the Colonies at the time of the American Revolution, should be applied in the instant case in order to obtain uniformity. This Court disposed of this argument in *Seaboard Airline Ry. Co. v. Kenney, supra*, wherein it said that in order to accept this argument it must be assumed that Congress intended to create a uniformity on one subject by producing discord and want of uniformity on many others. Therein, this Court refused to accept said argument.

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The petitioner states that both the District Court and the Circuit Court of Appeals regarded the parties as married at common law from the date of the removal of the impediment until decedent's death some two years later. *This is not true.* Said Courts refused to recognize the parties as married at common law because the law of the State of Virginia does not recognize common law marriage.

Chief Judge Sobeloff, in the Opinion of the Circuit Court of Appeals, found on pages 17 and 18 of Appendix A of the Petition, disposed of this contention as follows:

> "The appellant maintains that, although her marriage to Bell was bigamous, a valid common-law marriage was created once the impediment of the prior existing marriage was removed by divorce in 1957. The District Court disagreed, reasoning that because '(t)here is no admiralty law of domestic relations,' a federal court sitting in admiralty must look to state law to define statutory beneficiaries under the Jones Act. Bell v. Tug SHRIKE, 215 F.Supp. 377, 381 (E.D. Va. 1963). Virginia law does not recognize common-law marriages. On that basis the appellant was denied recognition as the surviving widow."

Page 10

The petitioner states that upon the removal of the impediment and continued good faith cohabitation as husband and wife, a common law marriage is deemed to exist, since marriage is preferable to concubinage. We have heretofore directed this Court's attention to the exception thereto, namely, that in those jurisdictions where common law marriages are invalid, no presumption or inference of marriage can arise from habit and repute after the removal of an impediment. *Volume 35, American Jurisprudence*, pages 312, 313.

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The petitioner states that her marriage to the decedent could not be meretricious since her intent to enter into a

legal and honorable state of matrimony is evidenced by her public act of securing a Virginia marriage license and being ceremoniously married. Any such alleged intent is overcome by the fact that she knew that decedent was still married to his second wife at the time of said ceremony. District Judge Hoffman determined that the petitioner knew, prior to her illegal marriage ceremony on December 13, 1950, that decedent was still married to his second wife, Catherine Estal Smith Bell. The honorable state of matrimony can never be entered under such circumstances.

CONCLUSION

The District Court and the Circuit Court of Appeals decided that petitioner's marital status must be determined under state law, and in particular, under Virginia law. Thereunder she is not a *statutory widow*, is not a *putative widow*, and is not a *common law widow*. Therefore, she is not entitled to recover as a *surviving widow* under the Jones Act.

This Court, no less than the Circuit Court of Appeals, is duty bound to observe the language of *McAllister v United States*, (S.Ct., 1954), 348 U.S. 19, 75 S.Ct. 6, wherein Mr. Justice Minton, speaking for this Court, in 75 S.Ct. at page 8, said:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous."

On the entire record in this case, it cannot be said that the District Court and the Circuit Court of Appeals were

clearly erroneous. Therefore, the Petition should be dismissed, and the Writ of Certiorari should be denied.

Respectfully submitted.

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